BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

PATRICIA A. SCOTT	)	
Claimant	)	
VS.	)	
	)	Docket No. 196,167
HCA WESLEY MEDICAL CENTER	)	
Respondent	)	
Self-Insured	)	
AND	)	
	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

The respondent and its insurance carrier request review of the Award dated May 13, 1996, and Award Nunc Pro Tunc dated May 15, 1996, entered by Special Administrative Law Judge Michael T. Harris. The Appeals Board heard oral argument on October 17, 1996.

APPEARANCES

Claimant appeared by her attorney, Garry L. Howard of Wichita, Kansas. Respondent, a self-insured, appeared by its attorney, Vaughn Burkholder of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, D. Steven Marsh of Wichita, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

The Special Administrative Law Judge awarded claimant permanent partial disability benefits based upon a 63.6 percent work disability. Respondent appealed, requesting review of the following issues:

(1) Whether claimant sustained her burden to prove that her injury occurred by accident arising out of and in the course of her employment with respondent.

(2) Whether claimant gave respondent timely notice of her injury or whether she had just cause for failing to give timely notice.

(3) The nature and extent of claimant's disability.

(4) The liability of the Workers Compensation Fund.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the briefs and arguments of the parties, the Appeals Board finds that the Award of the Special Administrative Law Judge should be affirmed.

The facts in this case are familiar to the parties and need not be repeated herein. They are adequately set forth in the Award by the Administrative Law Judge and the Appeals Board adopts those findings.

(1) Respondent's argument that claimant failed to establish her back injury arose out of and in the course of her employment relies predominately on the conflicting testimony as to date of accident. Clearly, the evidence is contradictory as to the date claimant's accident occurred. However, the mechanism of injury, that is, how the injury occurred, has never been challenged. Claimant has testified consistently that she was lifting a bag containing wet linen weighing approximately 50 pounds when she felt a pop in her back followed by pain in the lower part of her back and going down her legs. This same description of her accident was given to her coworker, her supervisor, the health care providers, and to the Court at preliminary and regular hearings.

The Appeals Board is not persuaded that the claimant's poor recollection as to the date of accident requires a finding that her testimony cannot be believed concerning how and where the accident occurred. No alternative explanation for claimant's injury has been offered. The Appeals Board finds that claimant has met her burden of proving that she met with personal injury by accident arising out of and in the course of her employment with respondent.

(2) The issue of notice is tied directly to the questions surrounding date of accident. When claimant reported her injury to her supervisor, Mr. John Van Roekel, on November 14, 1994, she was uncertain as to the accident date. Claimant told Mr. Van

Roekel that her accident occurred "approximately two weeks ago." Prelim. Hr'g at 65-67. This was taken by Mr. Roekel to mean November 1, 1994, which is what he put on the accident report form. Prelim. Hr'g Claimant's Exhibit No. 2 and Respondent's Exhibit No. 1. If the accident occurred on November 1, 1994, then this would obviously mean that when claimant gave notice of accident to Mr. Roekel on November 14, 1994, more than 10 days had passed.

K.S.A. 44-520 provides in pertinent part that:

> "[P]roceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident . . . . is given to the employer within 10 days after the date of the accident . . . . The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause . . . ."

At preliminary hearing, claimant testified to an accident date of November 7, 1994. When it was later established that claimant did not work on that date, claimant changed her testimony. At the regular hearing, claimant recalled that the accident occurred on November 6, 1994. The Special Administrative Law Judge found that claimant met with personal injury by accident "on or about November 6, 1994." The Appeals Board agrees with that finding. Accordingly, notice was given within ten days as required by statute.

(3) Claimant's right to permanent partial disability benefits is governed by K.S.A. 44-510e which provides in pertinent part:

> "The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury."

The Administrative Law Judge determined claimant had a 63.6 percent permanent partial disability. He arrived at this percentage by averaging a 100 percent wage loss with a 27.2 percent loss of tasks performing ability.

Respondent contends that the Special Administrative Law Judge erred in finding that because claimant was not employed she had a 100 percent wage loss. It is respondent's contention that because claimant has made no attempt to obtain employment beyond her contacts with respondent since her release to return to work, a period of approximately nine months, that claimant's wage-earning ability should be imputed to her under the rationale of the Court of Appeals set forth in Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995). The Appeals Board has previously held that the public policy espoused in Foulk applies to accidents arising under the 1993 amendments to the Workers Compensation Act where a claimant "has refused employment which the claimant has the ability to perform or voluntarily removes himself from the labor market without good reason." Wollenberg v. Marley Cooling Tower Co., Docket No. 184,428 (Opinion filed September 26, 1995)

The Appeals Board finds that Foulk does not apply to the facts and circumstances of this case. First, respondent never offered claimant an accommodated job within her restrictions. Second, although it presents a closer question, it has not been established that claimant has voluntarily removed herself from the labor market without good reason. Claimant admits that she has not looked for work other than with respondent since being released with permanent restrictions by her treating physician. Nevertheless, under the facts, the Appeals Board believes that claimant had reason to believe that she would be offered an accommodated position with respondent. Therefore, her failure to seek other employment does not, under the facts of this case, constitute a voluntary removal from the labor market. Accordingly, the public policy considerations in Foulk do not apply and a wage should not be imputed to claimant for purposes of determining work disability under K.S.A. 44-510e. The findings and conclusions by the Special Administrative Law Judge as to the nature and extent of claimant's disability are affirmed.

(4) Finally, with respect to the issue of Fund liability, as this is a post-July 1, 1994 accident, the Appeals Board finds the Fund has no liability for this Award. *See* Jones v. The Boeing Company - Wichita, Docket No. 196,447 (Opinion filed January 24, 1996).

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Special Administrative Law Judge Michael T. Harris dated May 13, 1996, should be, and is hereby, affirmed.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Patricia A. Scott, and against the respondent, HCA Wesley Medical Center, a self-insured, for an accidental injury which occurred on or about November 6, 1994, and based upon an average weekly wage of $280.18 for 16.29 weeks of temporary total disability compensation at the rate of $186.80 per week or $3,042.97, followed by 263.12 weeks at the rate of $186.80 per week or $49,150.82, for a 63.6% permanent partial general body disability, making a total award of $52,193.79.

As of October 31, 1996 there is due and owing claimant 16.29 weeks of temporary total disability compensation at the rate of $186.80 per week or $3,042.97, followed by 102.28 weeks of permanent partial compensation at the rate of $186.80 per week in the sum of $19,105.90 for a total of $22,148.87, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $30,044.92 is to be paid for 159.55 weeks at the rate of $186.80 per week, until fully paid or further order of the Director.

IT IS SO ORDERED.

Dated this _____ day of October 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

This Appeals Board Member respectfully dissents from the opinion of the majority in this matter. In order to find that claimant suffered accidental injury arising out of and in the course of her employment with respondent, a date of accident must clearly be defined. As the record shows, claimant's date of accident has changed three different times. It is questionable how this finding can support claimant's contentions.

Were claimant's confusion only related to the conversation with Mr. Van Roekel when she advised she had hurt herself approximately two weeks before, that would be understandable. However, claimant's testimony at the preliminary hearing that she had suffered accidental injury on November 7, 1994, was clear and unambiguous. Unfortunately for claimant it was also clearly in error as respondent proved claimant was not at work that day. It wasn't until the regular hearing nearly one year after the preliminary hearing that claimant decided her accident had actually occurred on November 6, 1994.

Claimant's entitlement to an award depends, to a significant degree, upon the credibility of claimant's own testimony. Credibility is a key factor when dealing with

contradictory testimony as in this case. Finding the claimant's testimony to be less than credible, I would respectfully deny claimant an award in this matter finding she has failed to prove by a preponderance of the credible evidence that she suffered accidental injury arising out of and in the course of her employment with respondent on the dates alleged.

_____
BOARD MEMBER

c: Garry L. Howard, Wichita, KS
Vaughn Burkholder, Wichita, KS
D. Steven Marsh, Wichita, KS
Michael T. Harris, Special Administrative Law Judge
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director